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JOSEPH F. SPANIOL, JR.

No. 87-116

In the Supreme Court of the United States

OCTOBER TERM, 1987

JESUS MARIA OCHOA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner's arrest and the search of packages taken from him were supported by probable cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1987. A petition for rehearing was denied on April 29, 1987 (Pet. App. 4a). The petition for a writ of certiorari was filed on June 29, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment and fined $50,000.

1. Prior to the events at issue here, the police department of the City of Santa Ana, California, circulated to local hotel and motel owners a "Crime Alert" bulletin (see Pet. App. 20a-23a). The bulletin stated that "the Southern California area has been inundated by persons who are smuggling large amounts of high-quality cocaine from South American countries" and requested assistance in identifying such persons (*id.* at 20a). The bulletin listed 19 characteristics that police officers had found to be typical of drug smugglers, and it requested that information about persons exhibiting such behavior be reported to the police.

On July 8, 1985, employees of the Westin Hotel notified the Santa Ana police department that two guests at the hotel—petitioner and Ivan Giraldo—had acted in a manner consistent with the characteristics listed in the bulletin. The employees reported that two guests were Latin males using Florida identification, that they separately arrived at the hotel without reservations, and that they carried no luggage. The employees also told the officers that petitioner was driving a white Mercury Cougar rental car. After meeting with the hotel employees, the law enforcement officers decided to place the two men under surveillance. Pet. App. 5a, 13a-14a; Tr. A89-A100, A114, A116-A118, A182-A184.

At approximately 6:35 the next morning, police officers observed petitioner arrive at the hotel in the white Mercury Cougar. About an hour and a half later, a surveillance officer in the hotel lobby, who was using a police radio, saw petitioner come into the lobby. Petitioner looked directly at the officer and the radio before leaving. The officer then moved to an undercover vehicle in the hotel parking lot, where he again encountered petitioner. Petitioner looked directly at the officer and turned around to continue looking at the officer as he walked away. Tr. A74-A76, A81-A82.

Shortly afterwards, petitioner drove the Mercury Cougar out of the hotel parking lot to a nearby parking structure. A few minutes later, petitioner drove out of the parking structure and proceeded to the shopping mall located across the street from the Westin Hotel. After parking his car, petitioner walked to a group of pay telephones on the second level of the shopping mall. He placed between 8 and 10 calls from a pay telephone and appeared to be using a telephone paging device. When he finished making the calls, petitioner left the shopping mall and drove back to the Westin Hotel in the Mercury Cougar. Two other Latin males, Jose Galindo and Juan Casteno, drove up to the hotel in a silver Chrysler shortly after petitioner's return. Tr. A36-A40, A61-A62, A158-A163.

Approximately 15 minutes later, Galindo and Casteno left the Westin Hotel in the silver Chrysler and drove to the shopping mall. At about the same time, petitioner left the hotel and drove the Mercury Cougar to the mall. The three men met at the mall entrance, went to a restaurant located inside the mall, and were joined by Ivan Giraldo, the man who had checked into the Westin Hotel on the same day as petitioner. The four men left the restaurant together after several minutes and walked through the mall, often looking around and behind themselves. Pet. App. 14a-15a; Tr. A21-A22, A41-A45, A163-A165.

After the four men had walked through the mall for 30 to 40 minutes, petitioner and Galindo left the mall building and got into the silver Chrysler. Petitioner drove through the parking lot to a parking space near the Sears store located in the shopping mall. Petitioner got out of the Chrysler, opened the trunk of the car, briefly looked inside, and closed the trunk. Petitioner and Galindo then walked toward the Sears store, but separated before they entered it. After walking around the store and making a call from a public telephone, petitioner left the store, walked back alone to the silver Chrysler, drove the car to

another part of the mall parking lot, and parked next to a brown Audi automobile. Petitioner got out of the Chrysler, stood near the rear of the Audi, looked around very slowly in all directions, and opened the Audi's trunk. He then removed two gift-wrapped boxes from the Audi and placed them in the trunk of the Chrysler. Pet. App. 15a; Tr. A46-A48, A129, A165-A169.

At that point, law enforcement officers approached petitioner and placed him under arrest. The officers obtained the car keys from petitioner, opened the Chrysler's trunk, removed the two gift-wrapped boxes, and took the boxes to the police station. The boxes were sniffed by a trained police dog and the dog "alerted," indicating the presence of narcotics. Later that night, a magistrate issued a search warrant authorizing the officers to open the boxes; approximately 20 kilograms of cocaine were found in the two boxes. Pet. 4-5; Pet. App. 16a-17a.

2. The district court denied petitioner's motion to suppress, holding that petitioner's arrest was justified by probable cause (Pet. App. 5a-9a). The court observed that the arrest was based on the statements of the hotel employees—"citizen informants who are traditionally considered to be trustworthy and reliable, since they have no reason to contrive information"—and evidence obtained during the police surveillance (*id.* at 6a). The court concluded that the police had, "by their own observations, established, through objective evidence * * * that there was probable cause to believe that [petitioner] was involved in committing an offense" (*id.* at 9a).

The court cited the "very unusual circumstance of a person who checks into a hotel from another state, from Florida, [and] suddenly has access to three different automobiles in the immediate vicinity" (Pet. App. 6a). To a highly trained law enforcement agent, the court noted, that conduct is suspicious. The court stated that "narcotics

traffickers are reluctant to use the telephone which creates a paper record" and that they use public telephones and paging devices rather than private telephones, as petitioner had done in this case. *Id.* at 6a-7a. Finally, the court observed that petitioner's driving was "erratic, suspicious, and [had] the characteristic of attempting to avoid surveillance" (*id.* at 7a). The court concluded that these facts, together with the transfer of the two packages from the Audi to the Chrysler, gave the officers probable cause to believe that petitioner was engaged in narcotics trafficking (*id.* at 8a).[1]

The court of appeals unanimously affirmed in an unpublished order (Pet. App. 2a-3a). It held that "[t]he trial court did not err in denying [petitioner's] Motion to Suppress physical evidence and there was ample probable cause to arrest [petitioner]" (*id.* at 2a).

ARGUMENT

1. Petitioner contends (Pet. 5-16) that the police officers lacked probable cause to arrest him. The district court and the court of appeals correctly rejected that fact-bound contention.

a. It is well settled that the Fourth Amendment permits police officers to make a warrantless arrest in a public place on probable cause. *United States* v. *Watson*, 423 U.S. 411 (1976); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 113-114 (1975). Probable cause exists where "the facts available * * * at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense ha[d] been committed." *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964) (quoting *Carroll* v. *United States*, 267 U.S. 132,

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[1] The court held that probable cause also justified the subsequent warrantless search of the Chrysler and that the warrant to search the packages was properly issued (Pet. App. 8a-9a).

162 (1925)). The determination whether probable cause exists is based on the "totality of the circumstances." *Illinois* v. *Gates*, 462 U.S. 213, 234-235 (1983). Moreover, "it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' " *Id.* at 235 (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969)).

In view of the totality of the circumstances in this case, the police officers' conclusion that petitioner was engaged in a narcotics transaction was eminently reasonable. Petitioner arrived from Florida without luggage and checked into the Westin Hotel without having made a reservation. After seeing a police officer in the lobby the next morning, petitioner sought to evade surveillance by driving his Mercury Cougar into a parking structure and taking a circuitous route to a shopping mall located across the street from the hotel. Even though a telephone was available to petitioner in his room, his sole apparent purpose for visiting the mall was to use the public telephones.

Petitioner's subsequent rendezvous with three other individuals was equally suspicious: the four men wandered around the mall apparently looking for police surveillance. Petitioner did not drive his own car when he left the mall, but rather got into the silver Chrysler and moved it to another part of the mall parking lot. Upon exiting the car, petitioner and Galindo checked the contents of the trunk. After entering the mall separately, petitioner and Galindo met again near the entrance. Petitioner then moved the Chrysler to yet another area of the parking lot and looked around in all directions before opening the trunk of the brown Audi. After the trunk was opened, petitioner transferred the two boxes that were covered with wrapping paper.

These facts are more than sufficient to warrant a reasonable belief that petitioner was probably engaged in a drug transaction. Indeed, it is difficult to conceive of any

other explanation for this sequence of bizarre activity. Petitioner's arrest was therefore supported by probable cause.

b. Petitioner's contention (Pet. 6-12) that his arrest was based solely on a "drug courier" profile is plainly wrong. To be sure, the Santa Ana police department had distributed a "Crime Alert" bulletin (Pet. App. 20a-23a) to local motels and hotels requesting their assistance in identifying possible narcotics smugglers based on a list of indicators of criminal activity. When petitioner and Giraldo checked into the Westin Hotel, hotel employees responded to that request for assistance by notifying the police department that petitioner and Giraldo matched some of the characteristics listed in the bulletin, *i.e.*, they were Latin males who had arrived from Florida without reservations and without luggage. However, the police did not arrest petitioner on the basis of that information; rather, the officers decided to initiate surveillance of petitioner and Giraldo. As the district court observed, the officers established "by their own observations * * * that there was probable cause to believe that [petitioner] was involved in committing an offense" (Pet. App. 9a).

c. Petitioner's contention (Pet. 12-16) that probable cause was lacking because his conduct was consistent with innocent behavior is likewise without merit. Indeed, the district court found that petitioner's activities were "hardly the type of conduct that a casual citizen – a casual traveler, would be expected to engage in" (Pet. App. 6a). In any event, probable cause requires not an actual showing of criminal activity, but only a probability or substantial chance of such activity. Ostensibly innocent behavior therefore may properly be considered in the probable cause determination because "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts" (*Illinois* v. *Gates*, 462 U.S. at 244 n.13).

And, as trained law enforcement officials, the officers were entitled to evaluate petitioner's activities in light of their experience and expertise. See, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411, 418 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968). The mere fact that some of petitioner's behavior could be explained in a manner consistent with innocence did not foreclose the police officers from concluding—correctly, as it turns out—that in view of all of the circumstances, petitioner was probably engaged in criminal activity.

2. Petitioner's contention (Pet. 17-19) that the search warrant for the two gift-wrapped boxes was invalid is plainly without merit. His entire argument is based on the erroneous supposition that the arrest was not justified by probable cause. Pet. 17 ("the taint of [the] illegal arrest was not cured by the later issuance of a search warrant"). Because petitioner's arrest was supported by probable cause, the search of the two boxes was not the fruit of an illegal arrest.

Moreover, because the police officers had probable cause to believe that the two boxes that were transferred from the Audi to the Chrysler contained contraband, they were entitled to seize those boxes from the trunk and to detain them while they applied for a search warrant. *United States* v. *Ross*, 456 U.S. 798, 824 (1982); *Arkansas* v. *Sanders*, 442 U.S. 753, 759-766 (1979).[2] A trained narcotics

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[2] Petitioner mistakenly relies on *United States* v. *Place*, 462 U.S. 696 (1983), in arguing that the boxes were detained for an unreasonable period of time before the search warrant was obtained. In *Place*, the Court held that a 90-minute detention of luggage in the absence of probable cause was unreasonable as part of a limited investigative stop at an airport. Because the police officers here already had probable cause to arrest petitioner and probable cause to believe the boxes contained contraband, the detention of the boxes pending the prompt application for and issuance of a warrant to examine their

detection dog sniffed the boxes at the police station and indicated that both contained controlled substances. Accordingly, as the district court correctly found (Pet. App. 8a), the search warrant for the boxes was amply supported by probable cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

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contents did not violate the Fourth Amendment. *United States* v. *Place*, 462 U.S. at 701. The district court found that there was no unreasonable delay in obtaining the warrant, which was issued that same day. Cf. *United States* v. *Johns*, 469 U.S. 478, 486-488 (1985).

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